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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. RICKY BURGOS, JR., Defendant and Appellant.	2d Crim. No. B289420 (Super. Ct. No. MA072056) (Los Angeles County)

Ricky Burgos, Jr. was convicted by jury of three counts of misdemeanor assault on a peace officer (counts 1-3; Pen. Code, § 241, subd. (c))[1], fleeing a pursing police vehicle while driving recklessly (count 4; Veh. Code, § 2800.2), driving under the influence of alcohol (DUI) with a prior DUI conviction (count 5; Veh. Code, §§ 23152, subd. (a), 23546), and driving with a license suspended due to a prior DUI conviction (count 6; Veh. Code, § 14601.2, subds. (a) and (d)(2)). In a bifurcated

[1] All statutory references are to the Penal Code unless otherwise stated.

proceeding, appellant admitted a prior strike conviction (§§ 667, subds. (b)-(j); 1170.12, subds. (a)-(d)) and a prior prison term enhancement (§ 667.5, subd. (b)). Appellant contends that the assault and DUI convictions are not supported by substantial evidence.

We affirm but modify the sentence to correct jurisdictional sentencing error. Appellant was sentenced to six years state prison on count 4 (Veh. Code, § 2800.2; three-year upper term, doubled based on the prior strike), plus one year on the prior prison term enhancement (§ 667.5, subd. (b).) On counts 1, 2, 3 (§ 241, subd. (c); misdemeanor assault) and count 5 (Veh. Code, §§ 23152, subd. (a), 23546), the trial court imposed 364-day consecutive sentences, and ordered that "all these will be state prison" and that "takes the total amount to 11 years state prison." On count 6, a 364-day sentence was imposed and stayed. (§ 654.) We modify the 364-day consecutive sentences on counts 1, 2, 3 and 5 to reflect that the sentences shall be served in county jail, upon completion of the seven-year prison term. (*People v. Erdelen* (1996) 46 Cal.App.4th 86, 92 (*Erdelen*).) As modified, the judgment is affirmed. (§ 1260.)

Facts

Shortly after midnight on August 25, 2017, California Highway Patrol Officers Max Chapman, Mark Recalde, and James Perkins saw appellant drive a large Ford SUV through a red light with his headlights off. The officers gave chase and ordered appellant to pull over. Appellant slowed almost to a stop and suddenly accelerated, resulting in a 18 minute police car chase. Appellant sped through stop signs and red lights, and turned into a cul-de-sac, where he made a U-turn.

Officer Perkins instructed Officer Chapman to "pin" the SUV by positioning the patrol car push bars against the front wheels of the SUV. Instead, Officer Chapman stopped the patrol car in front of the SUV, blocking appellant's exit. Officers Perkins and Recalde alighted from the patrol car with weapons drawn and ordered appellant out of the car. Appellant backed the SUV up a few feet, made hand gestures as if surrendering, and backed up another 30 feet. Without warning, appellant revved the engine and accelerated towards the officers.

Officers Perkins and Recalde jumped into the patrol car to avoid being hit as Officer Chapman backed the patrol car up about five feet to block appellant's escape. Appellant accelerated and struck the right rear side of the patrol car, causing it to sway left to right. The impact caused Officer Perkins to lose his grip on the door handle as the passenger door flew open. Officer Perkins grabbed the rifle rack inside the car and managed to put his foot inside the patrol car. Appellant continued to accelerate, dragged the SUV across the rear of the patrol car, and lost control of the vehicle. The SUV jumped the curb and went into a dirt field before speeding off.

Appellant ran more red lights and stop signs at speeds in excess of 100 miles per hour. Officers Perkins, Recalde, and Chapman led the chase, as other police cars joined in the pursuit. The car chase ended after a deputy sheriff deployed a spike strip, which punctured the SUV tires. Appellant slowed to a stop, throwing things out of his car.

Appellant had a strong odor of an alcoholic beverage on his person and was ordered out of the SUV. He had red and watery eyes, was unsteady on his feet, and his speech was heavy and slurred. As Officer Recalde searched appellant's person,

appellant said, "'He hit me.'" An officer responded, "'Yeah, cuz you weren't stopping, crazy, why weren't you stopping?'" Appellant declined to answer any questions, which Officer Chapman understood to mean that appellant was refusing to perform any DUI field sobriety tests. Appellant was transported to the hospital and refused to submit to a blood or breath test under the implied consent law. (Veh. Code, § 23612.)

At trial, Officers Perkins and Recalde, and a third officer who assisted in the arrest, Robert Castaniero, opined that appellant was driving under the influence of alcohol. A video of the car chase, filmed on the patrol car dashboard camera, was received into evidence. It was stipulated that appellant had a prior DUI conviction, a prior conviction for driving with a suspended license, and that his driver's license was suspended due to a prior DUI conviction.

Assault

Appellant contends that the assault convictions (counts 1-3) are not supported by substantial evidence. On review, all conflicts in the evidence and questions of credibility are resolved in favor of the verdict, drawing every reasonable inference the jury could draw from the evidence. (*People v. Boyer* (2006) 38 Cal.4th 412, 480.) A reversal for insufficient evidence is not warranted unless it appears that upon no hypothesis whatever there is sufficient substantial evidence to support the jury's verdict. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

"An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) It is a general intent crime and requires an intentional act and actual knowledge of facts sufficient to establish that defendant's act by its nature will probably and

directly result in the application of physical force against another. (*People v. Williams* (2001) 26 Cal.4th 779, 790; *People v. Aznavoleh* (2012) 210 Cal.App.4th 1181, 1190 [defendant need only be aware of what he is doing; the foreseeability of the consequences is judged by objective "'reasonable person'" standard].) Simply stated, "the crime of assault . . . focus[e[s] on the nature of the act and not on the perpetrator's specific intent." (*People v. Chance* (2008) 44 Cal.4th 1164, 1170)

Appellant argues that he did not intend to injure the officers and was only trying to drive around the patrol car. It is uncontroverted that appellant revved his engine and accelerated towards the officers and patrol car. Officers Recalde and Perkins jumped back into the patrol car just before the SUV struck the right rear of the patrol car. Appellant was traveling 10 to 15 miles per hour and still accelerating. The force of the collision caused the patrol car to sway back and forth as the SUV dragged across the rear of the patrol car. Officer Chapman feared the impact would tip the police car over.

Appellant claims that the patrol car hit him but the SUV had a long scratch from the front passenger door to the rear passenger door and a dent on the real panel. The indentation on the patrol car bumper was consistent with Officer Chapman's testimony that the SUV hit the patrol car at a perpendicular angle. Officer Chapman tried to block appellant's escape and said "I wasn't trying to ram anybody." Appellant argues that he tried to steer wide of the patrol car and ended up on the street curb. The patrol car video shows that the SUV jumped the curb and drove onto a dirt field. If appellant wanted to drive around the patrol car, he could have stayed on the street pavement. Officer Chapman estimated there was 32 feet of paved street in

back of the patrol car and that appellant had sufficient space to maneuver an escape.

Appellant argues that the officers "consented" to the assault when they purposefully backed up and hit appellant. The jury rejected the argument, and for good reason. The assault was completed before the collision. There is no requirement that an assault result in physical contact or actual injury to the victim. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.) After the officers blocked appellant's escape, appellant accelerated towards the officers and patrol car. Officer Perkins said appellant "floored it" and "didn't try to stop. There was no braking input." Officer Recalde said that appellant hit the rear side of the patrol car and kept accelerating. Appellant dragged the SUV across the back of the patrol car and the officers "felt the jolt again" as the vehicles separated.

Appellant contends there was no intent to commit an assault because the jury returned not guilty verdicts on the greater offense of assault with a deadly weapon. (§ 245, subd. (c).) A motor vehicle, however, is not an inherently dangerous weapon and only qualifies as a deadly weapon if used in a manner likely to produce death or great bodily injury. (*In re B.M.* (2018) 6 Cal.5th 528, 533-534.) The jury was instructed that "'[g]reat bodily injury' refers to significant or substantial bodily injury or damage; it does not refer to trivial or insignificant injury or moderate harm." (CALJIC 9.20.) And it was instructed that simple assault does not require that actual injury be inflicted. (CALJIC 9.00.) That was the case here.

Substantial Evidence- DUI

Appellant argues that the evidence does not support the finding that he was driving under the influence. A DUI can

be established by circumstantial evidence which, in this case, includes appellant's objective physical symptoms and refusal to submit to chemical testing under California's implied consent law. (CALJIC 16.835.) The prosecution was not required to prove any specific degree of intoxication. (*People v. Crane* (2006) 142 Cal.App.4th 425, 432.)

Appellant asserts there is no empirical evidence that his alcohol consumption impaired his ability to drive safely but the evidence clearly shows that appellant was under the influence and drove recklessly. (See *People v. Weathington* (1991) 231 Cal.App.3d 69, 84 [manner of driving can be considered in determining whether defendant was DUI]; *McDonald v. Dept. of Motor Vehicles* (2000) 77 Cal.App.4th 677, 686, 688 [Vehicle Code section 23152's "'under the influence'" means alcohol impaired driver's mental and physical abilities to such a degree that driver no longer has the ability to drive a vehicle with the caution characteristic of a sober person of ordinary prudence under the same or similar circumstances].)

Appellant drove without his headlights on, ran red lights and stop signs at speeds in excess of 100 miles per hour, "floored" the SUV at the officers and sideswiped their patrol car, lost control of the SUV and jumped the street curb, and refused to get off his cell phone or follow police commands after the SUV tires were punctured with a spike strip. Based on appellant's physical symptoms, erratic driving and refusal to take a chemical test, Officers Perkins, Recalde, and Castaniero opined that appellant was driving while under the influence of alcohol. It is settled that the testimony of a single witness, including an expert witness, is sufficient to constitute substantial evidence to support

a jury's finding of guilt. (Evid. Code, § 411; *People v. Allen* (1985) 165 Cal.App.3d 616, 623.)

Disposition

We affirm the judgment of conviction but correct a sentencing error on where the 364-day consecutive sentences on counts 1, 2, 3 and 5 are to be served. The trial court stated that the misdemeanor sentences are to be served in state prison, consecutive to the seven-year prison sentence on count 4 (Veh. Code, § 2800.2 plus prior strike) and the prison prior term enhancement (§ 667.5, subd. (b)). The abstract of judgment correctly states that appellant was sentenced to seven years state prison. We modify the judgment to reflect that the misdemeanor sentences are to be served in county jail, upon completion of the seven year prison term. (See § 18.5, subd. (a) [maximum sentence for misdemeanor is 364 days county jail]; *Erdelen*, *supra*, 46 Cal.App.4th at p. 92.) The clerk of the superior court shall amend the abstract of judgment to so reflect and forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed. (§ 1260.)

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Charles A. Chung, Judge

Superior Court County of Los Angeles

Laura R. Sheppard, under appointment by the Court of Appeal for Defendant and Appellant.

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